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IN RE MEXICO CITY AIRCRASH: PRIVATE RIGHTS OF ACTION UNDER THE FEDERAL AVIATION ACT AND THE WARSAW CONVENTION

A. INTRODUCTION

The Ninth Circuit held in *In re Mexico City Aircrash*,[1] that persons qualifying as "passengers" may bring an action for wrongful death[2] under the Warsaw Convention.[3]

In 1979, a Western Airlines jetliner crash landed at the Mexico City Airport killing seventy-four persons aboard the plane.[4] Western employees Theresa Haley, Regina Tovar, and Vikki Dzida[5] were among the victims. Haley and Tovar were on duty as flight attendants[6] and Dzida was en route to her scheduled assignment on another flight departing from Mexico City.[7]

Representatives of the three decedents sued Western Air-

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1. 708 F.2d 400 (9th Cir. 1983) (per Fletcher J., the other panel members were Pregerson, J., and Reinhardt, J.).

2. It is imperative to have a statutory or treaty basis in which to ground a wrongful death suit because the traditional common law rule in the United States recognized no cause of action for wrongful death. W. PROSSER, LAW OF TORTS § 127 (1971).

3. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, (as adopted by the U.S. at 49 Stat. 3000, T.S. No. 876) [hereinafter cited as the Warsaw Convention]. Although the United States was not a party to the Warsaw Conference, the Department of State sent observers to the proceedings. On April 17, 1934, President Roosevelt transmitted the Warsaw Convention to the Senate. Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. EXEC. DOC. No. G, 73d cong., 2d Sess. 3-4 (1934). The United States Senate gave its consent to the Convention on June 15, 1934 and it became law. The Convention has since been revised by the Hague Protocol in 1955, the Guadalajara Convention in 1961, the Guatemala Protocol in 1971, and, most recently, the four Additional Montreal Protocols in 1975. *See generally* Pogust, *The Warsaw Convention - Does It Create a Cause of Action?*, 47 FORDHAM L. REV. 366, 366 n.2, (1978).

4. 708 F.2d at 403.

5. *Id.*

6. *Id.* During the flight Haley and Tovar received full pay and full flight time credit.

7. *Id.* Dzida, while flying to her scheduled assignment received 100% of normal flight duty pay and 50% credit against her hourly duty assignment for that month.

lines and other defendants[8] claiming damages for death and loss of property.[9] Western moved to dismiss the suits[10] alleging that the decedents, as Western employees, were provided with an exclusive remedy under the California worker's compensation statute.[11]

Plaintiffs opposed the motion[12] based on the California dual capacity doctrine,[13] the Federal Aviation Act[14] and the Warsaw Convention.[15]

The district court granted Western's motion to dismiss, holding that all three decedents were acting within the course and scope of their employment at the time of the crash, and that the plaintiffs were limited to the exclusive remedies of the California Labor Code.[16]

Plaintiffs appealed to the Ninth Circuit contending that genuine issues of material fact were presented with respect to their causes of action, and that dismissal of their claims was erroneous.[17]

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8. The other defendants included: McDonnell Douglas Co., Inc.; Estate of Charles Gilbert; Sperry-Rand, Inc.; Sunstrand Data Control, Inc.; Bendix Corporation, Flight Systems Division; Rockwell International, Inc.; Collins Air Transport Division; and, Thompson, C.F.S. *Id.* at 400.

9. 708 F.2d at 403.

10. The district court's judgment did not indicate whether the dismissals were for failure to state a claim pursuant to FED. R. CIV. P. 12(b)6 or for summary judgment under FED. R. CIV. P. 5(B)a. The judgments were based on Western's affidavits. Therefore, the Ninth Circuit interpreted them as summary judgments. 708 F.2d at 404 n.3.

11. CAL. LAB. CODE §§ 3201-3213 (West 1976).

12. Plaintiff Dzida also opposed the motion to dismiss on the ground that his decedent was not aboard the flight in her capacity as a Western employee and, therefore, was not limited to a worker's compensation remedy. 708 F.2d at 403.

13. Under this doctrine, an employer may become liable in tort if in addition to his capacity as employer there is a second capacity which confers on him obligations independent of those imposed as employer. Douglas v. E & J Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

14. 49 U.S.C. §§ 1301-1552 (1976).

15. *See supra* note 3.

16. *See supra* note 11.

17. 708 F.2d at 402.

B. Background

1. *The Federal Aviation Act*

The Federal Aviation Act[18] governs civil aviation within the jurisdiction of the United States. Although the general intent of the Act is to promote the safety of air travelers,[19] the Act does not expressly create a private right of action for persons injured as a result of violations of the Act.[20]

Although the Ninth Circuit has never directly determined whether a private right of action may be implied from safety provisions of the Act,[21] the court in *Sanz v. Renton Aviation, Inc.*,[22] held that the personal representatives of decedents killed in an air crash could not maintain a cause of action under the Act[23] against the owner-lessor for the negligence of the pilot-lessee.[24] The court reasoned that extending liability to the owner-lessor would have little impact on the Act's underlying policy of safety,[25] and noted that if Congress had intended to create a civil remedy, one would have been expressly provided for in the Act.[26]

In *World Airways, Inc. v. International Brotherhood of Teamsters*,[27] the Ninth Circuit held that the authority of a labor arbitrator to shape a remedy in a pilot dispute was limited by

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18. 49 U.S.C. §§ 1301-1552.

19. 49 U.S.C. §§ 1421-1432 (1976 Supp. IV 1980). These provisions confer extensive powers upon the Secretary of Transportation to prescribe standards and regulations regarding numerous aspects of civil aviation for the purpose of promoting safety. Pursuant to this subchapter the secretary has promulgated comprehensive rules and guidelines published in Volume 14 of the Code of Federal Regulations.

20. No intent is explicitly manifested in the Act's legislative history. 708 F.2d at 406.

21. *Id.* at 405.

22. 511 F.2d 1027 (9th Cir. 1975). In *Sanz*, the personal representatives of persons killed in a light plane crash sued the agency from which the plane was rented. Plaintiffs asserted that the pilot was not competent to fly and that his deficiencies could have been discovered through greater diligence on the part of the rental company's agents.

23. 511 F.2d at 1029.

24. *Id.* at 1028-29. The plaintiffs based their argument on 49 U.S.C. § 1301(26) (1958).

25. *Id.*

26. *Id.*

27. 578 F.2d 800 (9th Cir. 1978). This case was an appeal from a district court judgment which vacated part of an arbitration award. The award required World Airways, Inc. to retrain and then provide an opportunity to requalify a pilot who had been demoted for repeated errors in judgment.

the policy of the Federal Aviation Act.[28] The court refused to imply a private right of action based on provisions of the Act unrelated to safety.[29]

Other circuits similarily have concluded that no right of action may be implied from the Act's safety related provisions.[30] Additionally, a number of circuits have refused to find a private right of action based on provisions of the Act unrelated to safety.[31] The majority of recent district court decisions that have examined whether private rights of action can be implied from the safety and non-safety related provisions of the Act have also held that no such right exists.[32]

The district court decisions holding that a private right of action can be implied from the Federal Aviation Act have relied on the Act's savings clause.[33] However, in *Middlesex County v.*

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28. *Id.* at 801.

29. The court stated that Congress had directed the Administrator of the Federal Aviation Administration to ensure air carriers performed their services with the highest degree of safety. *Id.* at 803. The court noted that "failure of an airline to comply with the provisions of the . . . Act and its regulations . . . can result in . . . civil penalties against the carrier." *Id.* In *Mexico City Aircrash*, the Ninth Circuit stated that this language does not suggest that the Federal Aviation Act contains a private right of action. 708 F.2d at 406.

30. For example, in Rauch v. United Instruments, Inc., 548 F.2d 452, 457-58 (3d Cir. 1976), that court found no private right of action for potential air crash victims. However, the court did not explicitly decide whether actual victims of air disasters may maintain a cause of action.

31. In Diefenthal v. C.A.B., 681 F.2d 1039 (5th Cir. 1982), *cert. denied*, ___ U.S. ___ (1983), the court held that no private right of action existed under the Federal Aviation Act whereby passengers could sue the carrier for failing to provide seats for plaintiff in the smoking section of the aircraft. In Kodish v. United Airlines Inc., 628 F.2d 1301 (10th Cir. 1950) an unsuccessful applicant for a pilot position was denied a cause of action for age discrimination under the Federal Aviation Act.

32. The majority view states it is improper to infer a private right of action from the Federal Aviation Act. In Obenshain v. Halliday, 504 F. Supp. 946 (E.D. Va. 1980), the court held that the representative of a passenger killed in an airplane crash due to the failure of runway lights had no wrongful death cause of action based on the Federal Aviation Act. *See also* Heckel v. Beech Aircraft Corp., 467 F. Supp. 278 (W.D. Pa. 1979); Yelinek v. Worlev, 284 F. Supp. 679 (E.D. Va. 1968); Moungey v. Brandt, 250 F. Supp. 445 (W.D. Wis. 1966).

33. The minority view is represented by Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972) and In re Paris Aircrash, 399 F. Supp. 732 (C.D. Cal. 1975). In *Gabel*, the court concluded that the representatives of decedents killed in an air crash could maintain a cause of action against the common carrier. 350 F. Supp. at 612. The holding was based on the congressional emphasis on safety found throughout the Act. *Id.* at 617. However, the court also relied on the savings clause, incorporated in the Act, in making its decision. The court stated that the wrongs prohibited in the Act's safety re-

National Sea Clammers Association,[34] the Supreme Court reversed a lower court's holding which found an implied right of action based on a savings clause, found in a federal regulatory statute.[35] The Court held that the lower court incorrectly relied on the savings clause in finding a cause of action, because the main emphasis of the Act was an administrative regulation and enforcement.[36]

In *Cort v. Ash*,[37] the United States Supreme Court developed a four step analysis to be used in determining when a cause of action may be implied from a federal regulatory statute. The *Cort* analysis inquires whether: (1) the plaintiff is a part of the class for whose benefit the statute was enacted; (2) there is an indication of legislative intent, explicit or implicit, either to create or deny such a remedy; (3) it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law.[38] Lower courts presently employ the *Cort* analysis to determine whether a private remedy can be implied from a fed-

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lated provisions are cumulative with respect to state remedies. *Id.* The savings clause states that "nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but . . . are in addition to such remedies." 49 U.S.C. § 1506 (1976). Congress has never expanded on the meaning of this section. *See* H.R. REP. No. 2360, 85th Cong., 2d Sess. 18-19, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3741, 3758; H.R. REP. No. 2254, 75th Cong., 3d Sess. 11-12 (1938). In *Paris Air Crash*, a passenger airplane taking off from Paris, France, crashed in France, and killed all the passengers and employees on board the aircraft. Two hundred and three suits, arising from the air crash, were filed in the Federal District Court for the Central District of California. The major claim alleged in the suits was for strict product liability against General Dynamics and McDonnell Douglas. The court concluded that there was a clearly articulated federal right to enforce a cause of action for wrongful death arising from operation of an unsafe aircraft. 399 F. Supp. at 748.

34. 453 U.S. 1 (1981). Plaintiffs brought suit in the district court against officials from New York and New Jersey alleging damage to the fishing grounds. Plaintiffs alleged the damage was caused by ocean dumping of sewage. Plaintiffs sought injunctive and declaratory relief and compensatory and punitive damages.

35. *Id.* at 11.

36. *Id.* at 15-17.

37. 422 U.S. 66 (1975). In *Cort*, a stockholder brought suit seeking damages in favor of Bethlehem Steel Corporation and for injunctive relief. The claim was in connection with advertisements made during the 1972 Presidential election which were paid for from the general corporate funds. Plaintiff alleged this violated federal law which prohibits corporations from making contributions in specified federal elections.

38. *Id.* at 78.

eral regulatory statute.[39]

2. *The Warsaw Convention*

The Warsaw Convention was drafted with the intent of creating a uniform body of law to govern the liability of air carriers in international air transportation.[40] The legislative history of the Convention indicates that the drafters did not directly address the issue of whether the treaty creates a cause of action for personal injury or wrongful death.[41]

However, Article 17 of the Convention provides in part that the carrier shall be liable for damage sustained in the event of death, wounding, or bodily injury suffered by a passenger, if the accident causing the injury took place on board the aircraft.[42] This section has been construed to create a cause of action for both wrongful death and personal injury.[43]

In *Choy v. Pan-American Airways Co.*,[44] a claim for wrongful death based on the Warsaw Convention was disallowed.[45] The district court held that the treaty was not enforceable in the United States without an enabling act either creating a cause of

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39. *See, In Re Paris Aircrash, supra* note 33. *See generally*, Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of Cort v. Ash*, 23 ILL. L. REV. 657 (1978).

40. The Convention's preamble states that the signatories "have recognized the advantage of regulating in a uniform manner the conditions of international transportation by air." 49 Stat. 3014, T.S. No. 876 (1934) (unofficial translation). The need to establish uniform rules resulted in the First International Conference on Private Aeronautical Law at Paris in 1952. The delegates at Paris established the Comite International Technique d'Experts Juridique Aeriens (CITEJA), a committee assigned the task of drafting international agreements regarding international air law. After debate whether a cause of action could be created through an international convention, CITEJA decided that a carrier would be liable for damages due to wrongful death or physical injury. In addition, any actions for liability against a carrier were required to be based on CITEJA rules. The Warsaw delegates accepted the CITEJA draft as their source document. After eight days of debate the draft took its final form as the Warsaw Convention. *See* Pogust, *supra* note 3 at 366-67.

41. The issue of a cause of action for damages was, however, discussed in general terms. *Id.*

42. *See* Warsaw Convention, *supra* note 3, art. XVII.

43. Salamon v. Koninklijke Luchtvaart Maatschappij, N.V., 107 N.Y.S.2d 768 (Sup. Ct. 1951) *aff'd mem.*, 281 A.D. 965, 120 N.Y.S.2d 917 (1953).

44. 1941 A.M.C. 483 (S.D.N.Y. 1941). In *Choy*, plaintiff, as administrator of decedent's estate, sued for the wrongful death of a passenger killed in the crash of a seaplane which was crossing the Pacific Ocean.

45. *Id.* at 487-488.

action or naming those who could sue for a passenger's death.[46]

However, in *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*,[47] the court reached the opposite result.[48] The court held that the Convention created a cause of action, and that the plaintiff could sue for the wrongful death of her deceased spouse based on Article 17.[49] The court reasoned that if the convention did not create a cause of action in Article 17, it would be difficult to understand the reasons for Article 17's existence.[50]

In *Kamlos v. Compagnie Nationale Air France*,[51] the court rejected the *Salamon* conclusion,[52] based on the text of a letter from Secretary of State Cordell Hull to President Roosevelt describing the Convention. Hull's letter stated that Article 17 created only a presumption of liability against the aerial carrier upon the happening of an accident.[53] The court concluded that the law of the forum supplied the only possible cause of action since one was not provided for in the Convention.[54]

In *Noel v. Linea Aeropostal Venezolana*,[55] the Second Cir-

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46. *Id.* at 488. In Wyman v. Pan-American Airways, Inc., 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd*, 267 A.D. 947, 48 N.Y.S.2d 459, *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945), the court followed the *Choy* holding. The court did not elaborate with any further rationale for declining to find a cause of action in the Convention. The court stated that the Convention did not create new substantive rights, but operated within the framework of existing rights and remedies.

47. *See supra* note 43.

48. *Id.* at 770-71.

49. *Id.*

50. *Id.* at 773.

51. 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954).

52. 111 F. Supp. at 401-02.

53. The letter was important because it was a summary of the Convention's provisions based on the reports of U.S. observers, present at the proceedings. Secretary Hull wrote:

> "The effect of Article 17 . . . of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier."

Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. EXEC. Doc. No. G, 73d Cong., 2d Sess. 4 (1934), *reprinted in* 1934 U.S. Av. 239, 243-44.

54. 111 F. Supp. at 402.

55. 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). *Noel* involved an action

cuit followed *Kamlos*, and held that the Convention did not create a cause of action for wrongful death.[56] Twenty-one years later, the Second Circuit, in *Benjamins v. British European Airways*,[57] reversed its decision in *Noel*. In reversing the *Noel* decision, the court noted that the overriding goal of the Convention was to formulate a uniform set of rules governing international air transportation.[58] Thus, it was inconsistent with the spirit of the treaty to require a plaintiff to find an independent domestic cause of action.[59]

In making its decision, the court relied on the First Circuit's opinion in *Seth v. British Overseas Airways Corp.*,[60] and Article 30(3) of the Convention.[61] In *Seth*, the court held that Article 30(3) created a cause of action for the loss, damage, or delay of baggage during carriage by successive air carriers.[62] Although the language of Article 30(3) and Article 17 substantially differed, the court reasoned that if a cause of action was created under Article 30(3), the intent of the drafters was to create a cause of action throughout the Act, including Article 17.[63]

The Second Circuit also noted that Great Britain was the only other Warsaw signatory which had a common law rule against wrongful death recovery.[64] Shortly after the Convention's ratification, the treaty was incorporated into Britain's national laws.[65] By including supplemental provisions,[66] a wrongful death cause of action was created in Article 17. The *Benjamins*

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by the executors of decedent's estate against a corporation owned by the United States of Venezuela for damages for wrongful death. The decedent was killed in an air crash in the Atlantic Ocean 30 miles from New Jersey.

56. *Id.* at 680.

57. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

58. *Id.* at 917-918.

59. *Id.*

60. 329 F.2d 302 (1st Cir. 1954), *cert. denied*, 379 U.S. 858 (1964). In *Seth*, passengers sued British Overseas Airways Corporation for loss of baggage.

61. *See* Warsaw Convention, *supra* note 3, art. XXX(iii). Article XXX(iii) states: "As regards baggage or goods, the passenger or consignor who is entitled to delivery shall have a right of action against the last carrier. . . ."

62. 329 F.2d at 305.

63. *Id.*

64. 572 F.2d at 918-19.

65. This was done through the Carriage by Air Act, 1932. 22 & 23 Geo. 5, ch. 36, *reprinted in* C. SHAWCROSS & K. BEAUMONT, AIR LAW 681-92 app. 2 (2d ed. 1951).

66. *See* Provisions as to Liability of Carrier in the Event of the Death of a Passenger 22 & 23 Geo. 5, ch. 36, sched. 2 (1932). *Id.* at 692.

court reasoned that the British implementation scheme raised the inference that the British delegates to the Convention believed Article 17 created its own cause of action.[67] In light of Britain's apparent treatment of Article 17, the court concluded that the provision should be construed similarly to create a cause of action in the United States.[68]

3. *California's Worker's Compensation Law*

The California Worker's Compensation Act[69] is a compulsory statute[70] establishing an exclusive system of compensation for injuries arising out of and in the course of employment.[71] Under certain circumstances, Federal law will override the state statute and provide the remedy for recovery.[72] For example, in *Smith v. Canadian Pacific Airways, Ltd.*,[73] the Second Circuit noted that because the Warsaw Convention is a treaty, and is the supreme law of the land it preempted local worker's compensation law.[74]

The worker's compensation law also may be inapplicable where an employee is acting outside the scope of employment at the time of the injury. In *Demanes v. United Air Lines*,[75] personal representatives sued United for the death of four pilots who were killed in an air crash while commuting between Los Angeles and Denver.[76] The court held that the pilots' representatives were not limited to a worker's compensation remedy because the pilots were passengers for the purposes of liability when the accident occurred.[77] The fact that the pilots were commuting was critical to the determination that they were not acting as employees.[78]

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67. 572 F.2d at 918-19.
68. *Id.*
69. CAL. LAB. CODE §§ 3201-3213 (West 1976).
70. CAL. LAB. CODE § 3700 (West 1976).
71. CAL. LAB. CODE § 3601 (West 1976).
72. Article VI of the United States Constitution provides that the laws of the United States and all treaties made under the authority of the United States shall be the supreme law of the land. U.S. CONST. art. VI, cl. 2.
73. 452 F.2d 798 (2d Cir. 1971).
74. U.S. CONST. art. VI, cl. 2.
75. 348 F. Supp. 13 (C.D. Cal. 1972).
76. *Id.* at 14.
77. *Id.*
78. *Id.*

C. THE COURT'S ANALYSIS

The Ninth Circuit used the four part test articulated in *Cort*[79] to determine that the Federal Aviation Act contains no implied private right of action.[80] Considering the first inquiry, whether the plaintiffs were part of the class for whose benefit the statute was enacted,[81] the court stated the legislation was enacted to promote safety in aviation and to protect persons traveling aboard aircraft.[82] This purpose was effectuated by requiring the Secretary of Transportation to prescribe minimum standards for the design and operation of aircraft.[83] The court

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79. 422 U.S. 66 (1975).
80. 708 F.2d at 408.
81. *Id.* at 406.
82. *Id.*
83. The minimum standards provided for by the Act are found in 49 U.S.C. § 1421. It provides in relevant part:

> Minimum standards; rules and regulations
> (a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
> (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;
> (2) Such minimum standards governing appliances as may be required in the interest of safety;
> (3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (a) the inspection, servicing and overhaul of aircraft, aircraft engines, propellers, and appliances; (b) the equipment and facilities for such inspection, servicing, and overhaul; and (c) in the discretion of the Administrator, the periods for, and the manner in which such inspection, servicing, and overhaul shall be made including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees;
> (4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;
> (5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and
> (6) Such reasonable rules and regulations or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to pro-

reasoned that since Congress intended to protect everyone traveling aboard the aircraft, the decedents could not be excluded from the protected class simply because they were employees.[84] Accordingly, the court determined the first element of the *Cort* test was fulfilled.[85]

The court, in applying the second requirement of *Cort*, inquired into the legislative history to determine whether or not Congress intended to create a remedy for damages. Noting that the emphasis of the Act was on administrative regulation and enforcement,[86] the court found no evidence of congressional intent to create a remedy for damages.[87] The court followed the basic rule of statutory construction which disallows implication of other remedies where a statute expressly provides for a particular remedy.[88]

The Court, citing the Supreme Court decision in *Middlesex*, rejected the plaintiff's contention that a private right of action was created by the presence of the savings clause incorporated in the Act.[89] The Act's emphasis on administrative regulation and enforcement,[90] in combination with the absence of legislative intent to create a private right of action, led the court to determine that the second and most significant element of the *Cort* test was not satisfied.[91] Because this element failed, the court found it unnecessary to examine the remaining *Cort* factors and concluded the Act contained no implied private right of action.

In the second part of its analysis[92] the court inquired

> vide adequately for national security and safety in air commerce.

Id.

84. 708 F.2d at 406.

85. *Id.*

86. *Id* at 407.

87. *Id.*

88. *Id.* at 407.

89. 708 F.2d at 407.

90. The court found that the Federal Aviation Act created an extensive statutory enforcement scheme allowing civil penalties to be levied for violations of the Act. The statute also authorized the Secretary of Transportation to seek injunctive relief to compel compliance. *See* 49 U.S.C. §§ 1471, 1487 (1976).

91. 708 F.2d at 408.

92. *Id.*

whether the Warsaw Convention created only a uniform set of legal rules to govern international air transportation, or also created a right to recover for injuries or death based on Article 17.[93] The Ninth Circuit, relying upon the reasoning of *Benjamins*,[94] concluded that persons qualifying as "passengers" within the meaning of the treaty can recover for injuries or death based on Article 17.[95]

According to the court, the language of Article 17 stating that "the carrier shall be liable"[96] demonstrates that the Convention drafters intended to create a cause of action for injured or killed passengers.[97] The court determined that it was unlikely the language was intended to create only a presumption of liability to be employed solely in actions available under domestic law.[98] The court reasoned that since a statute of limitations provision was incorporated in Article 29[99] of the Convention, a right of action was necessarily established subject to the limitation period.[100] The court stated that if the drafters of the Convention intended that only domestic law be the source of a plaintiff's action, it would not have incorporated such a provision.[101] The court also pointed out that the language of Article 29 speaks of "the right of damages," implying that a cause of action is cre-

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93. *Id.* at 409.

94. 572 F.2d 913.

95. The Ninth Circuit had never examined the *Benjamins* holding prior to *Mexico City Aircrash*. However, in Dunn v. Trans World Airways, Inc., 589 F.2d 408, 411-12 (9th Cir. 1978), the Ninth Circuit noted that the *Benjamins* rule contradicts the previous majority rule but it was not necessary for the court to determine whether *Benjamins* should be followed.

96. *See* Warsaw Convention, *supra* note 3, art. XVII.

97. 798 F.2d at 412.

98. *Id.*

99. Article XXIX states: "(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped." *See* Warsaw Convention, *supra* note 3, art. XXIX.

100. 708 F.2d at 412.

101. The court also pointed to the official French text of the Convention. The first portion of article XXIX in the French text reads, "(1) 'action an responsabilite' doit etre intenté, sous peine de decheance, dans le delai de deux ans. . . . 49 Stat. at 3007, T.S. NO. 86 at 8. The court stated that a literal translation of this language would be, "[t]he action for liability must be brought within two years, else it lapses." 708 F.2d at 412. The court said: "By speaking in this way of the action of liability and not merely in terms of an action for liability subject to the Convention, the article shows that the Convention creates cause of action." *Id.*

ated by the Convention.[102]

The court also examined Article 24,[103] previously relied upon by courts to deny a cause of action under Article 17.[104] The court interpreted the "without prejudice" language of the Article to be the result of uncertainty among the Convention delegates concerning the attributes of the right they created.[105] The delegates realized that several claimants might attempt to collect damages on behalf of a single dead passenger in different forums.[106] Therefore, the meaning of this provision was left intentionally vague. The court interpreted this ambiguity to mean that eligibility for recovery on wrongful death was a question for the law of the forum; it was not to be viewed as evidence that the Convention did not create a cause of action.[107] The court stated that the only real question was whether the indefiniteness of Article 24, concerning the identity of persons entitled to recover, precludes finding a right of action.[108]

The court citing *Moragne v. States Marine Lines, Inc.*,[109] which overruled the traditional common law rule prohibiting wrongful death actions; except those with specific statutory authorization,[110] held that difficulty in ascertaining persons entitled to recovery did not preclude finding of a cause of action for

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102. *Id.*

103. Article XXIV states:

> (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention. (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, *supra* note 3, art. XXIV.

104. *See* Pogust, *supra* note 3, at 373.

105. 708 F.2d at 413-14.

106. *Id.*

107. *Id.*

108. *Id.*

109. 398 U.S. 375 (1970). In *Moragne*, the Court considered a situation where a longshoreman had been killed while working aboard a vessel within Florida territorial waters. Defendants moved to dismiss the case on the ground that federal statutory law provided no recovery for wrongful death in a state's territorial waters, and that Florida's wrongful death statute did not recognize unseaworthiness as a theory of recovery. The Court rejected this argument and held that a wrongful death action can be maintained under federal maritime law even without specific statutory authorization. *Id.* at 376.

110. *Id.* at 388-92.

wrongful death.[111] Therefore, a wrongful death action could be based on Article 17 of the Warsaw Convention although there is no specific statutory authorization to being such a suit.

The court next considered whether the cause of action created by the Convention was available to the plaintiffs.[112] To allow recovery under Article 17, plaintiffs' decedents had to qualify as "passengers" within the meaning of the section. Plaintiffs argued that they qualified as passengers within the meaning of Article 17 because Article 1 makes the Convention applicable to persons receiving "gratuitous transportation."[113]

The panel held that the two flight attendants were not passengers within the meaning of Article 17.[114] Their flights were not for the principal purpose of moving from one point to another but for the exclusive purpose of performing their employment duties.[115] Thus, the court held that the summary judgments on the claims of the two flight attendants were proper.[116]

The court reached a contrary conclusion in regard to the claim of Vikki Dzida's representative.[117] Because Dzida was a Los Angeles based employee traveling to Mexico City to take duty aboard a plane departing from that location, the court held that genuine issues of material fact existed as to whether or not she was receiving "transportation" as a "passenger" aboard that flight.[118] The court stated that the record was insufficient to show that Dzida was not, as a matter of law, a passenger aboard the airplane.[119] The critical inquiry was whether Dzida was commuting or if she was contractually obligated to be on board the flight.[120] The court stated that if she was in fact commuting,

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111. 708 F.2d at 415.

112. 708 F.2d at 416.

113. *Id.* at 416-17. Article I states, in part: "(1) This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise." Warsaw Convention, *supra* note 3, art. 1.

114. 708 F.2d at 417.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

then she probably qualified as a passenger.[121] The summary judgment entered against Dzida therefore, was erroneous and was reversed.[122]

The court also considered Western's contention that any cause of action available to the plaintiffs under federal law was subordinate to California's worker's compensation remedy.[123] Western, citing *King v. Pan American Airways*[124] and *Stoddard v. Ling-Temco-Vought, Inc.*,[125] argued that the worker's compensation remedy was the sole remedy available for the death of an employee acting in the course and scope of employment.[126]

In rejecting Western's contention, the court noted that the holding in *Demanes*[127] directly contradicted Western's argument. The court also distinguished both *King* and *Stoddard* from the present case, in that the former involved suits commenced under the Death on the High Seas By Wrongful Act, an Act which expressly provides that state statutes giving or regulating any right of action are not affected by its provisions.[128] The Warsaw Convention, which creates a cause of action founded in federal treaty law,[129] contains no such provision. Therefore it preempts any provision of local law which purports to limit the recovery allowed by the Convention.[130]

D. CRITIQUE

The Ninth Circuit, in *Mexico City Aircrash*, is the first circuit to directly examine the issue of whether or not the Federal Aviation Act contains an implied right of action for wrongful death. In holding that no wrongful death cause of action may be implied from the Act, the court followed the general trend not to impute private remedies to federal regulatory statutes absent evidence of congressional intent to create such a right.[131]

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121. *Id.*
122. *Id.*
123. *Id.*
124. 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960).
125. 513 F. Supp. 314 (C.D. Cal. 1980).
126. 708 F.2d at 418.
127. 348 F. Supp. 13 (C.D. Cal. 1972).
128. 46 U.S.C. § 767 (1976).
129. 708 F.2d at 412.
130. *Id.* at 418.
131. *See supra* note 34.

Under the first part of the *Cort* analysis, the court properly recognized that both airline passengers and employees were part of the contemplated benefitted class of the legislation.[132] The major emphasis of the Act is on safety. By applying minimum maintenance and operational standards[133] the aircraft is made safer for both passengers and employees.[134]

In the second part of the *Cort* analysis,[135] the court correctly determined that there was no congressional intent to create a federal cause of action. Moreover, under *Middlesex*,[136] the necessary intent could not be implied from the Act's savings clause.[137]

The focus of the Act is on administrative regulation and enforcement.[138] If Congress had intended to create a cause of action, the intent would be manifested in the Act or its legislative history. In the absence of any explicit legislative authority it would be improper for the court to assume the legislative role of creating such a remedy.[139] Absent compelling evidence of affirmative congressional intent, a federal court should not infer a pri-

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132. It is not disputed, even by those who argue against an implied cause of action from the Federal Aviation Act that passengers were to be the intended beneficiaries of this legislation. This conclusion is based on the extensive statutory scheme related to safety. Douglas, *Air Disaster Litigation Without Diversity*, 45 J. AIR. L. & COM. 411, 447 (1980).

133. *See* 49 U.S.C. §§ 1421-1432 (1976).

134. A plaintiff cannot even argue for an implied right of action unless he can identify a violation of the provisions of 49 U.S.C. §§ 1301-1552 (1976), or the regulations promulgated pursuant to the legislation dealing with safety. The plaintiff must also assert the violation has caused the crash out of which the suit arises. *See* Douglas, *supra* note 132, at 447.

135. This is the most important factor in the *Cort* analysis because it goes directly to the question of whether Congress intended to create a federal cause of action. However, the other three factors are also helpful in answering the question. *See* Crawford and Schneider, *supra* note 39, at 674.

136. 455 U.S. 1, 9 (1981).

137. 708 F.2d at 407.

138. *Id.*

139. There is evidence that members of Congress do not believe that any private right of action exists in the Act. In 1968 and 1969 Congress considered bills that would have created an exclusive federal private cause of action arising out of certain aircraft crashes. *See generally*, Note, *Aircraft Crash Litigation*, 38 GEO. WASH. L. REV. 1052 (1970). However, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980). Congress has never expanded on the meaning of the savings clause. However, in Obenshain v. Halliday, 504 F. Supp. 946, 950 (E.D. Va. 1980), the court stated that the section is not intended to create a private cause of action but simply to preserve state causes of action.

vate cause of action.

The Ninth Circuit's determination that Article 17 created a private right of action is inappropriate because it ignores Congress' intent to limit federal jurisdiction in Convention cases.[140] The court overreached its jurisdiction, as the decision encroaches upon the executive and legislative functions of the federal government to create and define the international laws to which the United States is bound.[141]

Article 6, Clause 2 of the United States Constitution states that treaties made under the authority of the United States are the supreme law of the land.[142] However, this clause has been interpreted to apply only to self-executing treaties which need no further act of Congress to be effective.[143] Where some additional act of Congress is necessary to give effect to the treaty, it is not operative.[144] Therefore, even if the Convention purported to create a cause of action, unless the provisions are self-executing, or supplementary legislation has been adopted, a cause of action would not be effective in the United States.[145] No statutory cause of action based on the Warsaw Convention has been adopted by Congress.[146] Therefore, in the absence of supplementary legislation, Article 17 must be self-executing in order to create a cause of action.

Examination of Article 17 reveals that there is no provision providing for those entitled to bring suit.[147] Additionally, as the rights provided by the Convention are contractual,[148] and are personal to the passenger, legislation would be necessary for the right to survive a passenger's death.[149] Article 17 has not been supplemented with this type of legislation. Therefore, the Article is incomplete because it provides only for inchoate liability.

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140. *See generally* W. BISHOP, INTERNATIONAL LAW 166-91 (3d ed. 1971).
141. *Id.*
142. U.S. CONST. art. VI, cl. 2.
143. *See* Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).
144. *Id.*
145. *See* Pogust, *supra* note 3, at 371 n.34.
146. *Id.*
147. *See* Warsaw Convention, *supra* note 3, art. XVII.
148. *Id.*
149. *Id.*

The Ninth Circuit's reliance on *Benjamins* is inappropriate for four reasons. First, the *Benjamins* court did not fully determine whether Article 17 contains a self-executing provision.[150] Although the language of Article 17 that "the carrier shall be liable," suggests an intent to create a cause of action, the Article fails to articulate the terms and conditions necessary to allow recovery.[151]

Secondly, the *Benjamins* decision is unsupported since the *Benjamins* court's assertion that the Convention should be applied uniformly[152] is not compelled by the text of the treaty.[153] For example, Article 21 provides that the law of the forum court determines whether the negligence of a passenger will reduce his recovery by a degree comparable to his own fault.[154] Under Article 24, the determination of who possesses the right of action for wrongful death and the damages recoverable is also a question for federal law.[155] Article 22 limits a carrier's liability for the death or wounding of a passenger except where the carrier is guilty of willful misconduct.[156] Article 25 leaves the definition of willful misconduct to the law of the forum.[157]

Thirdly, the interpretation of *Seth*[158] in *Benjamins* is incor-

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150. Under the traditional approach, a treaty is self-executing whenever its provisions prescribe a rule by which rights of private citizens may be determined. Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). A treaty may be self-executing if it was the intent of the drafters that its provisions be effective without further legislation. Comment, *Criteria for Self-Executing Treaties*, U. ILL. L.F. 238, 239-40 (1968).

151. It was first suggested in Komlos that Article XVII merely created a presumption of liability that shifted the burden of proof and simplified the plaintiffs' recovery procedure. *See supra* note 57.

152. The majority even recognized, ". . . it is not literally inconsistent with [the principle of] universal applicability to insist that a would-be plaintiff first find an appropriate cause of action in the domestic law of a signatory. . . ." 572 F.2d at 917-18.

153. *See* Warsaw Convention, *supra* note 3, arts. XXI (contributory negligence of passenger), XXIV(ii) (who has the right of action) XXV (standard by which carrier's willful misconduct is defined), XVIII(ii) (questions of procedure), XXIX(ii) (limitation of the time to sue). Two of these articles were not discussed by the *Benjamins* majority.

154. *See* Warsaw Convention, *supra* note 3, art. XXI.

155. *Id.* at art. XXIV.

156. *Id.* at art. XXII.

157. *Id.* at art. XXV.

158. *Seth* had never been cited prior to the *Benjamin* decision. However, in a district court decision in the same circuit as *Seth*, without citing *Seth*, the court held that federal question jurisdiction was inapplicable. Fabiano Shoe Co. v. Alitalia Airlines, 380 F. Supp. 1400, 1403 (D. Mass. 1974).

rect. The Second Circuit asserted that since *Seth* held that a cause of action is created under Article 30(3), the apparent purpose of the drafters was to create a cause of action throughout the Convention.[159] In light of the conflicting language in Article 30(3) and Article 17, and the varied subject matter in the two provisions, the *Benjamins* court's comparison is unwarranted. Unlike Article 17, Article 30(3) is the only provision in the Convention which states when a passenger "shall have a right of action."[160]

Finally, the *Benjamins* court also misinterpreted the manner in which Great Britain implemented the Warsaw Convention.[161] The Second Circuit incorrectly assumed that the Convention and the Carriage by Air Act of 1932[162] included the same provisions.[163] The Carriage by Air Act consisted of two appended schedules, the first containing the text of the Convention and the second consisting of the wrongful death provisions.[164] The text of the Act indicates that only a presumption of liability arises from the Convention and that the provisions found in Schedule Two were necessary to create a cause of action for wrongful death.[165]

The Carriage by Air Act of 1961,[166] which replaces the 1932 Act, conclusively demonstrates that Great Britain did not interpret Article 17 to create a cause of action. The 1961 Act provides that the liability presumed in the Convention gives rise to a cause of action created by statute.[167] The *Benjamins* majority, neglecting to examine adequately the Carriage by Air Act, reached the wrong conclusion.

The Ninth Circuit, in addition to relying on the *Benjamins* reasoning, advanced further reasons why the decision should be

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159. 572 F.2d at 918.

160. *See* Warsaw Convention, *supra* note 3, art. XXX(iii).

161. 572 F.2d at 919.

162. The Carriage by Air Act of 1932 22 & 23 Geo. 5, ch. 36, *reprinted in*, C. SHAWCROSS & K. BEAUMONT, AIR LAW 681-92 app. 2 (2d ed. 1951).

163. 572 F.2d at 918-19.

164. Provisions as to Liability of Carrier in the Event of the Death of a Passenger 22 & 23 Geo. 5, ch. 36, sched. 2 (1932), *reprinted in*, AIR LAW, *supra* note 162.

165. *Id.*

166. 9 & 10 Eliz. 2 ch. 27. *Id.* at app. B 53-71.

167. *Id.*

followed. The court deemed it unlikely that Article 17 created only a presumption of liability.[168] However, in the letter from Secretary of State Cordell Hull to President Roosevelt describing the Convention, Hull stated that Article 17 creates only a presumption of liability.[169] The court insisted that the importance of this letter is outweighed by the Convention drafters repeated statements of the need for a uniform set of rules to govern international air transportation.[170] Nevertheless, the Convention contains substantial concessions to national law in Articles 21, 22, 24 and 25,[171] suggesting that the drafters intended to defer to the wrongful death statutes existing in the signatories' national laws.

The Ninth Circuit also incorrectly explained that Article 24(2) was the result of uncertainty among the Convention delegates regarding the attributes of the right they were creating.[172] The debates at the Rio Conference[173] conclusively demonstrate that the Warsaw Convention was to apply to existing causes of action for wrongful death and not to create new ones.[174] The Rio debates indicate that the Convention delegates did not intend to interfere with wrongful death statutes existing at national law.[175]

The Ninth Circuit attached great significance to the *Moragne* decision.[176] In *Moragne*, the Supreme Court held that a wrongful death action can be maintained without specific statutory authorization.[177] However, *Moragne* could be used as authority only if the Warsaw drafters had intended to create a cause of action in Article 17. From the reasons delineated above, it is apparent that no such intent existed. Therefore, the Convention cannot be used as a reference point for the right the panel purports to create.

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168. 708 F.2d at 412.
169. *See supra* note 53.
170. 708 F.2d at 415-16.
171. *See supra* notes 154-57.
172. 708 F.2d at 414.
173. *See* Pogust, *supra* note 3, at 377.
174. *Id.*
175. *Id.*
176. 708 F.2d at 414.
177. 398 U.S. at 388-92.

E. Conclusion

Although the Ninth Circuit reached a sound conclusion regarding the Federal Aviation Act in *Mexico City Aircrash,* the court improperly concluded that Article 17 creates a private right of action.

The court's reliance on the *Benjamins* decision is unjustified because of the distorted manner in which that court viewed the provisions of the treaty. The Ninth Circuit, like the *Benjamins* court, erroneously interpreted the intentions of the Convention drafters. The court failed to adequately discuss the record of the Convention and its subsequent related conferences. The court's analysis disregards the importance of determining legislative intent through careful reasoned analysis.

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